PP v. KEE YEOH SONG

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CRIMINAL TRIAL NO: 45SO-2-10-2015]
6 SEPTEMBER 2016

CRIMINAL LAW: *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Section 26A – Accused charged for knowingly assisting illegal migrant to exit country unlawfully – Whether testimony of prosecution witnesses implicated accused – Failure to call material witness and absence of satisfactory explanation for not calling material witness – Whether weakened prosecution's case – Whether mere presence of accused at scene of crime sufficient to implicate accused – Whether prima facie case established at end of prosecution's case*

CRIMINAL PROCEDURE: *Charge – Framing or particulars of – Offence under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Gist of offence – Providing assistance to migrant to enter or exit Malaysia unlawfully – Whether necessary to expressly specify or identify manner in which assistance provided – Whether omission to provide particulars fatal to prosecution's case – Whether accused misled by omission – Criminal Procedure Code, ss. 154 & 156*

CRIMINAL PROCEDURE: *Prosecution – Prima facie case – Whether testimony of prosecution witnesses implicated accused – Failure to call material witness and absence of satisfactory explanation for not calling material witness – Whether weakened prosecution's case – Whether mere presence of accused at scene of crime sufficient to implicate accused – Whether prima facie case established at end of prosecution's case*

The accused was charged under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') for knowingly assisting one M Zakir, an illegal migrant, to exit the country unlawfully. The facts revealed that the accused permitted M Zakir to stay at the fish factory belonging to the accused until he could make arrangements for his boat to take M Zakir back to Indonesia. The key prosecution witness was M Zakir himself who testified that he had no valid travel documents to return to Indonesia after working in Taiping for several years. Hence, he contacted one Mudin who asked him to come to Kuala Lumpur where he was picked up by one Kak Ani who subsequently took him to the fish factory where he was asked to stay until it was safe for him to make the trip back to Indonesia. Several postponement of his departure infuriated him causing a scuffle between M Zakir and a few men at the fish factory. M Zakir then fled the fish factory and lodged a police report which led to the arrest of the accused. It was M Zakir's testimony that the accused was not involved in any part of the arrangements to smuggle him back to Indonesia and stated that he had only dealt with Mudin, Kak Ani and few other men at the fish factory. M Zakir testified that he did not know the accused and only met him during the scuffle. At the end of the prosecution's case, the accused submitted that:

(i) the charge was defective as it lacked particulars as to the mode or manner in which the accused was allegedly involved in the smuggling as defined under s. 2 of the Act; and (ii) there was no evidence to show that the accused was involved in the smuggling and therefore, the prosecution had failed to establish a *prima facie* case against the accused.

Held (acquitting and discharging accused):

(1) The gist of the offence is the provision of assistance to a migrant to enter or exit Malaysia unlawfully. It is not necessary for the charge to expressly specify or identify the manner in which the assistance was provided. In any event, the omission to provide particulars was not fatal. Section 156 of the Criminal Procedure Code states that the omission to provide the particulars as required by s. 154 does not render the trial invalid unless the accused was misled by that omission. In the circumstances, the accused was not misled or prejudiced in any way. (paras 27-29)

(2) M Zakir's testimony did not implicate the accused, whilst the testimony of other witnesses was that the accused was not involved in the smuggling of M Zakir. The evidence revealed that Kak Ani was a material witness, who should have been called. However, no satisfactory explanation was proffered by the prosecution for not calling her. The absence of any evidence that the accused knew Kak Ani and Mudin, and the further fact that he was not at the factory when M Zakir was brought to the fish factory weakened the prosecution's case against the accused. (paras 31 & 32)

(3) The fact that the accused was in charge of the management of the fish factory did not *ipso facto* suggest that he had permitted M Zakir to stay at the fish factory. The fish factory was a huge building and the mere presence of the accused at the fish factory was insufficient to implicate the accused with the smuggling of M Zakir. (para 33)

(4) The prosecution's argument that the fish factory had committed an offence by permitting M Zakir to stay there, based on the operation of s. 64 of the Act, was misconceived. Section 64 is only triggered if the fish factory is a body corporate and that it had committed an offence. A body corporate is created by statute and includes companies incorporated under the Companies Act 1965 and foreign companies. The documents obtained from the Companies Commission of Malaysia disclosed that the fish factory was a partnership firm, not a body corporate. Hence, s. 64 did not assist the prosecution. (paras 35 & 36)

Case(s) referred to:

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Wong Nyet Wah v. PP [1962] 1 LNS 208 HC ***(refd)***

Legislation referred to:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 26A, 64

Criminal Procedure Code, ss. 154, 156

For the accused - Geethan Ram; M/s Geethan Ram
- V Santhiran; M/s Charanjit, V Santhiran & Partners

For the prosecution - Mohd Fadhil Ab Wahab; DPP

Reported by S Barathi

JUDGMENT

SM Komathy JC:

[1] The accused, Kee Yeoh Seong, was charged under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 with the following offence:

> Bahawa kamu, antara 2 September 2015 jam lebih kurang 7.00 malam hingga 4 September jam lebih kurang 6.00 petang di Pelantar Boo Thing Fishery, Lot 9130 (Kilang Ikan) Jalan Tepi Sungai, Hutan Melintang, di Daerah Hilir Perak, di dalam Negeri Perak Darul Ridzuan, telah melakukan penyeludupan migran terhadap M Zakir (No. Paspot: Tiada, Warganegara: Indonesia) Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26A Akta Anti Pemerdagangan Orang dan Anti Penyeludupan Migran 2007.

[2] The prosecution called a total of 18 witnesses to establish the charge against the accused. The learned Deputy Public Prosecutor in his opening address stated that it was the case for the prosecution that the accused had knowingly assisted one M Zakir, an illegal migrant, to exit the country unlawfully by permitting him to stay at his fish factory until he (the accused) could make the arrangements for his boat to take M Zakir back to Indonesia.

Evidence Of Prosecution Witnesses

[3] The key prosecution witness in this case was M Zakir himself. His evidence was that sometime in August 2015, he decided to return to Indonesia after working several years in Taiping. He contacted one Mudin as he had no valid travel documents, and was asked to come to Kuala Lumpur. On 1 September 2015, he arrived in Kuala Lumpur and was picked up at Pudu Raya by one Kak Ani, who took him to her house. He paid her a sum of RM1,000 to make the necessary arrangements for his return to Indonesia.

[4] The next day, ie, on 2 September 2015, he and several other Indonesians were driven in two cars to Boo Thing Fish Factory ("the fish factory"), in Hutan Melintang, the factory mentioned in the charge. There he met "enam lelaki Flores" and was informed by Kak Ani that the lelaki Flores would make the arrangements for a boat to take him back to Indonesia. He and the other Indonesians were asked to stay in the two rooms

on the first floor of the fish factory until it was safe for them to make the trip back to Indonesia. His departure date was postponed several times by the lelaki Flores and this frustrated him. During their stay at the fish factory, they were provided Maggie Mee for their meals by SP14 Koo Ling Chin.

[5] On the morning of 4 September 2014, the lelaki Flores notified him that a boat was available, but a few hours later he was told that he had to wait another day. At this point he demanded that he be allowed to phone Mudin to arrange for Kak Ani to pick him up from fish factory as he was unhappy with the delay. He was incensed when his request was denied and threw a tantrum. At this point, SP14 came there to inquire what was happening. He elbowed SP14 in the chest and a scuffle broke out.

[6] In the midst of the scuffle, the accused and others appeared and tried to help SP14. The accused punched him. Fearing for his life as he was outnumbered, he fled the fish factory with the other Indonesians. He lodged a police report which eventually led to the arrest of the accused.

[7] In cross-examination, M Zakir was asked and accepted that the accused was not involved in any part of the arrangements to smuggle him back to Indonesia. He also accepted that in this connection, he only dealt with Mudin, Kak Ani and the lelaki Flores. He did not know the accused and that the first time he met the accused was during the scuffle with SP14 on 4 September 2015. His admission is illustrated by his answers to these questions:

Peguam	:	Itulah kali pertama kamu bersemuka dengan tertuduh ini, betul?
Saksi (SP1)	:	Betul.
Peguam	:	Sebelum itu belum ada lagi, betul?
Saksi (SP1)	:	Betul.
Peguam	:	Pada kamu, peranan tertuduh di dalam isu ini apabila beliau telah memukul kamu, betul?
Saksi (SP1)	:	Betul.
Peguam	:	Selain daripada itu tidak ada?
Saksi (SP1)	:	Tidak ada.
Peguam	:	Saya juga cadangkan, dari segi penghantaran pulang Encik Zakir, tiada diuruskan oleh beliau, betul?
Saksi (SP1)	:	Betul.
Peguam	:	Bahkan kamu berada di sana sehingga 3-4 hari tiada apa-apa penglibatan dengan dia, betul?
Saksi (SP1)	:	Betul.

[8] M Zakir further accepted that Kak Ani and the "enam lelaki Flores" were the people involved and responsible for making the arrangements to smuggle him back to his home in Indonesia. His evidence in this regard was as follows:

Peguam : Encik Zakir setuju dengan saya, itu hari bila ada masalah saja, terus menghubungi Kak Ani?

SaksI (SP1) : Saya menghubungi Mudin untuk menghubungi Kak Ani.

Peguam : Kenapa tiba-tiba Zakir hendak hubungi Mudin, Kak Ani kerana Encik Zakir tahu merekalah yang menguruskan segalanya?

Saksi (SP1) : Dengan Kak Ani tidak kenal ...

Peguam : Betul tidak Encik Zakir beritahu mahkamah "Saya menghubungi Mudin minta Kak Ani ambil saya di pelantar", betul?

Saksi (SP1) : Betul.

Peguam : Kenapa hendak suruh dia yang datang ambil kerana dia yang mengurus? Betul?

Saksi (SP1) : Betul.

Peguam : Kerana itu juga Encik Zakir pembayaran satu ribu bukan kepada lelaki Flores, bukan lelaki Cina tetapi kepada Kak Ani, betul?

Saksi (SP1) : Betul.

Peguam : Urusan untuk balik ke Indonesia, dari segi tambang, dari segi pembayaran kepada siapa?

Saksi (SP1) : Kak Ani.

Peguam : Dari segi janji-janji, bila kamu berangkat, naik apa berangkat, dari mana ke mana oleh siapa?

Saksi (SP1) : Kak Ani.

...

Peguam : Boleh katakan sebenarnya dari awal, orang yang beritahu kamu perancangan teliti adalah Kak Ani?

Saksi (SP1) : Ya.

Peguam : Dan sehingga kamu bakal berangkat, Kak Ani juga maklumkan?

Saksi (SP1) : Ya, betul.

Peguam : Duit ini dibayar pada Kak Ani bila?

Saksi (SP1) : Pada malam 2.9.2015.

Peguam : Jam lebih kurang berapa?

Saksi (SP1) : Lebih kurang 11 malam.

Peguam : Dan sebenarnya, dipenghujungnya Encik Zakir tidak berpuas hati saya belum balik, saya mahu wang saya kembali. Sudah tangguh banyak kali, kamu hendak Kak Ani bayar balik wang satu ribu, betul?

Saksi (SP1) : Betul.

Peguam : Perasaan tidak puas hati kamu di atas keseluruh kepada orang yang janji pada kamu, betul?

Saksi (SP1) : Betul.

A
Peguam : Dan pemandu kereta Alza itu lelaki Melayu?
Saksi (SP1) : Lelaki Melayu.
Peguam : Dan gambar dia ada tunjuk pada kamu? Kawad cam ada?
Saksi (SP1) : Tidak ada.
Peguam : Tiada siasat atas isu ini?
B
Saksi (SP1) : Tidak Ada.
Peguam : Tetapi dia jugalah yang menguruskan kamu, mengambil kamu, mengambil satu lagi gerombolan orang dan hantar ke sini, betul?
Saksi (SP1) : Betul.
C
Peguam : Dan orang itu bekerjsama dengan Kak Ani?
Saksi (SP1) : Betul.
Peguam : Encik Zakir boleh setuju dengan saya, sebenarnya keseluruhan ini dipanggil pengurusan penghantaran Encik Zakir pulang ke Indonesia adalah diuruskan oleh Kak
D
Ani, betul?
Saksi (SP1) : Betul.
…
Peguam : Kamu setuju dengan saya, dari segi penghantaran penting selain daripada Kak Ani adalah 6 lelaki Flores. Betul?
E
Saksi (SP1) : Betul.
Peguam : Ini adalah orang yang sebenarnya menampak memain peranan dalam menghantar kamu pulang?
Saksi (SP1) : Betul.
F
…
Peguam : Kamu setuju 6 lelaki Flores warganegara Indonesia ini sebenarnya mempunyai pengetahuan mengenai feri, hantar ke mana, daripada pelabuhan mana, ialah orang yang menguruskan semuanya?
Saksi (SP1) : Betul.
G
Peguam : Dan ini 6 lelaki Flores selain Kak Ani tahu kamu 'kosong'?
Saksi (SP1) : Betul.
Peguam : Kamu bukan beritahu semua orang saya 'kosong'?
Saksi (SP1) : Betul.
H
Peguam : Dalam tempoh masa Encik M Zakir berada di penginapan ini, kamu diurus oleh 6 orang ini sahaja, betul?
Saksi (SP1) : Betul.
Peguam : Apa-apa soalan yang kamu ada kamu tanya pada dia orang.
I
Saksi (SP1) : Betul.
Peguam : Kenapa Tanya dengan ini 6 orang kerana merekalah yang menguruskan penghantaran kamu pulang?
Saksi (SP1) : Betul.

Peguam	:	Tapi kamu boleh setuju dengan saya bahawa penginapan, perjalanan, tunda dan sebagainya semuanya diuruskan oleh lelaki-lelaki Flores?
Saksi (SP1)	:	Betul.
Peguam	:	Sepertimana arahan oleh Kak Ani?
Saksi (SP1)	:	Betul.
Peguam	:	Dari segi banyak kekangan perjalanan ditunda ini Sedia Maklum Oleh Siapa?
Saksi (SP1)	:	Lelaki Flores.

[9] SP10 Halim bin Mohd Nordin, a worker at the fish factory, testified that the accused owned a fishing boat. He went on to say that his job at the fish factory was to help the accused unload fish when the boat came to the jetty and to weigh the fish. The boat was used only for fishing, and was never used to smuggle migrants unlawfully out of Malaysia.

[10] He further testified that the accused was seldom present at the fish factory and was away for most part doing marketing for the business. There were two rooms on the first floor of the fish factory and these had been rented out. An Indonesian called Panjang rented one of these rooms.

[11] SP12 Kee Gek Yong, is the accused's sister and a clerk at the fish factory. She stayed at the fish factory with her own family and father, whilst the accused and his wife stayed elsewhere. She confirmed that the accused was not at the factory everyday as he was in charge of marketing for the family business.

[12] According to her, the accused did not come to the fish factory from 2 to 3 September 2015, and only did so on the night of 4 September 2015, for a family dinner. There was a loud commotion that night at the factory. The accused went up to the first floor to investigate.

[13] SP12 went on to add that the accused did not use his fishing boat to smuggle migrants, and confirmed that Panjang rented one of the rooms in the factory. She was aware that Panjang sometimes brought his friends over to his room.

[14] SP14 testified that he owned two fishing boats and was allowed to dock his boats at the jetty at the fish factory for a fee. He was not at the fish factory everyday and would only be there if his boats were docked there. According to him, on 4 September 2015, he went up to the first floor of the fish factory to collect some items, and was confronted by M Zakir who wanted to know why he was there. M Zakir punched him and he retaliated by punching him back. He maintained that this was the first time he saw M Zakir.

[15] The other prosecution witnesses who were called corroborated SP10's and SP12's evidence that the accused did not use his boat for smuggling migrants. They also confirmed that the accused was seldom present at the factory as he was in charge of marketing.

[16] The last prosecution witness was Inspector Al-Ikhsan bin Borhan, the investigating officer. He testified that the documents he had obtained from Companies Commission of Malaysia showed that the business carried out at fish factory was a partnership business run by the accused and his brothers. The accused had recently had taken over management of the business from his father.

[17] That was essentially the sum total of the evidence led in support of the charge.

Burden On Prosecution

[18] At the close of the prosecution case, the court must undertake a maximum evaluation of evidence adduced by the prosecution to determine if the prosecution has proven a *prima facie* case against the accused. If a reasonable doubt is created, it would mean that the prosecution has failed to prove a *prima facie* case. See *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65, [2002] 2 MLRA 383 and *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, [2011] 2 AMR 680, [2012] 5 MLRA 377.

Human Smuggling

[19] Section 26A states any person who carries out smuggling of migrants commits an offence.

[20] The expression "smuggling of migrants" is defined in s. 2. It includes:

> (a) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

[21] And, a smuggled immigrant is defined in s. 2 as a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants.

[22] To establish the charge against the accused, it is thus incumbent on the prosecution to prove:

(a) That M Zakir was a smuggled migrant; and

(b) That the accused had assisted in the smuggling of migrant M Zakir out of Malaysia.

Submissions At The End Of The Prosecution Case

[23] Counsel for the accused canvassed two main points at the end of the prosecution case. First, that the charge was defective as it lacked particulars as to the mode or manner in which the accused was allegedly involved in the

smuggling of M Zakir as defined in s. 2 of the Act. This was one of the necessary ingredients of the charge and by reason of the fact that it is not so mentioned the charge was defective.

[24] Secondly, that the prosecution had failed to establish a *prima facie* case against the accused. There was no evidence to show that the accused was involved in the smuggling of M Zakir. The available evidence merely established that the accused was in charge of the management of the fish factory, and was at the fish factory on the night the scuffle broke out between M Zakir and SP14. This evidence was insufficient to show the accused was involved in the smuggling of M Zakir.

[25] The Deputy Public Prosecutor refuted the submissions advanced by counsel for the accused.

Whether Charge Defective

[26] The gravamen of the complaint on the validity of the charge is that it does not specify or identify the alleged act committed by the accused that amounts to smuggling.

[27] The offence of people or human smuggling involves migrants being assisted with entry into a country or exit out of a country through illegal means. People smugglers are individuals or groups who assist others to enter or exit a country through irregular methods by providing air or sea access. The gist of the offence is the provision of assistance to a migrant to enter or exit Malaysia unlawfully. In my view, thus, it is not necessary for the charge to expressly specify or identify the manner in which the assistance was provided.

[28] Even if I am wrong in taking this view, the omission to provide particulars is not fatal. Section 156 of the Criminal Procedure Code states that the omission to provide the particulars as required by s. 154 does not render the trial invalid unless the accused is misled by that omission. The s. 156 insofar as material reads:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[29] In the instant case, as the learned deputy had indicated in his opening address the facts on which the charge was based, the accused was not misled or prejudiced in any way.

No Evidence To Implicate Accused

[30] I turn next to consider the submission of the defence that there is insufficient evidence to show that the accused had assisted M Zakir, an illegal migrant to exit Malaysia unlawfully. As noted in the beginning of this

judgment, it was the case for the prosecution that the accused had provided assistance by permitting M Zakir to stay at the fish factory until he was able to arrange for his boat to take M Zakir back to Indonesia unlawfully.

[31] To prove the charge, the prosecution placed reliance on the testimony of M Zakir and the testimonies of the other prosecution witnesses, and the fact that the accused owned a boat, and was in charge of the management of the fish factory. The testimony of M Zakir, however, does not implicate the accused. M Zakir accepted that he did not deal with the accused at any stage and that all arrangements in connection with his return to Indonesia were handled by Kak Ani. As for the remaining witnesses, they turned hostile to the prosecution and collectively testified that the accused was not involved in the smuggling of M Zakir. In consequence, their evidence in my view is of no avail in any manner to establish the charge levelled against the accused.

[32] The evidence in this case reveals that all arrangements in connection with M Zakir were arranged by Mudin and Kak Ani. It was Kak Ani who brought M Zakir to the fish factory. She was thus a material witness who should have been called. Her phone number was known to the prosecution and no satisfactory explanation was proffered for not calling her. The absence of any evidence that the accused knew Kak Ani or Mudin, and the further fact that he was not at the factory when M Zakir was brought to the fish factory weakens the prosecution case against the accused.

[33] It is true that the accused was in charge of the management of the fish factory at the material time. This does not *ipso facto* suggest that he had permitted M Zakir to stay at the fish factory. The fish factory was a huge building as evidenced by the photographs produced at the trial. Neither does the presence of the accused at the fish factory on the day the scuffle broke out between M Zakir and SP14, assist the prosecution case in any way. Mere presence is insufficient to implicate the accused with the smuggling of M Zakir. In this connection, I refer to the judgment of Ong J in *Wong Nyet Wah v. PP* [1962] 1 LNS 208; [1962] 1 MLJ 312. At paras. 6-8, His Lordship said:

> While there could have been no doubt about the guilt of the second accused, it is equally clear that the mere presence of the appellant on the scene is not *ipso facto* conclusive proof of his participation in the offence. The crucial point which had to be considered was whether, on the occasion of the earlier meeting on October 22, the demand by the second accused was made, not only while the appellant was in the immediate vicinity of the parties to the conversation, but also that it was within the hearing of the appellant, so that the demand was actually known or must have been known by him. Unless it was proved that the appellant had such knowledge he cannot by mere inference be held to have had any guilty knowledge of the purpose of the second accused's subsequent visit to collect the money.

The law is quite clear. In the case of *Gray* 12 Cr App R 244 246 Lord Reading CJ said:

> It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has participated in the crime – that is to say, if he is a confederate – he is guilty, although he has no hand in striking the fatal blow. Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence.

[34] For the reason stated, I find that the prosecution has failed to establish a *prima facie* case against the accused.

[35] There is one other matter. The prosecution had also contended that the fish factory had committed an offence by permitting M Zakir to stay at the fish factory. As the accused was in charge of the management of the fish factory at the material time, by operation of s. 64 of the Act, he was also guilty of the offence. Section 64 reads:

> Where any offence against any provision of this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, or was in any manner responsible for the management of any of the affairs of such body corporate, or was assisting in such management, shall also be guilty of that offence unless he proves that the offence was committed without his knowledge, consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

[36] In my view, this argument is misconceived. Section 64 is only triggered if, the fish factory is a body corporate, and secondly that it had committed an offence. A body corporate is created by statute and includes companies incorporated under the Companies Act and foreign companies. The documents obtained by the investigating officer from the Companies Commission of Malaysia disclose that the fish factory is a partnership firm. In my view, a partnership firm is not a body corporate. No authority was cited by the prosecution to show that a partnership firm comes within the definition of a body corporate. Section 64 thus does not assist the prosecution.

Conclusion

[37] For the foregoing reasons, the accused is acquitted and discharged of the charge against him.